

CONDOMS OVERTURNED ON APPEAL: TEENS STRIPPED OF THEIR RIGHTS

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INTRODUCTION

Teenagers have complicated decisions to make while they learn about themselves and their changing bodies. The more information and support that adolescents have, the better equipped they are to experiment with intimate relationships. With or without proper parental support and guidance, teenagers make choices about their sexuality, choices that often have serious consequences. This paper argues for expanded sex and health education classes in the public school system, as a means of supplementing teenagers' knowledge about pregnancy, AIDS, venereal diseases and birth control. Sex education classes often neglect to cover these controversial topics, preventing students who need the input the most from learning crucial information. Despite its immediacy, the issue of expanded sex and health education in public school systems remains unresolved in our courts.

In 1991, the New York Board of Education ("Board") decided to meet the growing demand for increased teen awareness and reproductive resources by expanding their current health education curricula. The Board added a voluntary condom distribution program in which students could receive condoms and counseling if they chose to utilize the service. A group of parents sued the Chancellor and the Board, claiming that the program violated their due process rights under the Fourteenth Amendment and their right to free exercise of religion under the First Amendment. The parents did not seek to abolish the program, but rather, to add a parental consent provision enabling them to preclude their child from obtaining condoms.

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The Supreme Court of New York ("lower court") ruled in favor of the Board,¹ allowing the program to continue as it was originally implemented, without a parental consent provision. The lower court, in analyzing the constitutional implications, focused on the fact that the program was voluntary. The New York Supreme Court, Appellate Division ("appellate court"), reversed the lower court and declared the program an unconstitutional violation of petitioner's parental rights under the Fourteenth Amendment. The appellate court instructed the public school to add a parental consent provision as a means of curing the constitutional defect. Both the appellate and the lower courts agreed on the free exercise of religion interpretation. Each court ruled that no viable claim could be premised on the parents' proffered assertion of a First Amendment infringement.

This article argues that the program is constitutional and that the appellate court's analysis is flawed. The appellate court found the voluntary condom distribution program to be: (1) a health service, as opposed to an educational program, which requires parental consent under New York's Public Health Law; (2) a violation of the parents' liberty interest in raising their children in accordance with their own beliefs; and (3) lacking the requisite compelling state interest necessary to override the parents' constitutionally protected liberty interest.

This paper hypothesizes that the parents did not have a constitutionally protected liberty interest in rearing their children when the program at issue was of a voluntary nature. Second, the program should have been classified as an educational service, thus removing it from the purview of mandatory parental consent under the law. The court neglected to sufficiently address the privacy right of minors to receive contraception without their parents' permission. Third, even if the court upheld the program based on a parental liberty interest, the state's interest in combating AIDS and teen pregnancy is strong enough to meet the compelling necessity prong, thereby superseding the parents' interest in abolishing the program. Lastly, this author suggests that the appellate court's disparate conclusions regarding the First and Fourteenth Amendment claims of the parents illustrate how notions of morality, rather than justice, shaped the majority opinion.

1. *In re Alfonso*, 584 N.Y.S.2d 406, 413 (N.Y. Sup. Ct. 1992) (holding, in part, that the petition seeking an order to enjoin the implementation of the condom distribution program, unless the minors' parents consented, was denied).

I. PARENTS' DUE PROCESS CLAIM

In *Alfonso v. Fernandez*,² the appellate court held that the condom distribution program implemented in the New York public school system violated petitioners' due process rights.³ The United States Supreme Court has interpreted the Fourteenth Amendment of the United States Constitution as granting parents a liberty interest in the care, custody and moral education of their children.⁴ The Court first recognized a constitutional right to raise one's children without interference from the State in *Meyer v. Nebraska*.⁵ In *Meyer*, the Supreme Court decided that a statute which prohibited teaching foreign languages to children in public school up until the eighth grade was an unconstitutional infringement upon parents' liberty interest as guaranteed by the Fourteenth Amendment.⁶ The Supreme Court found the statute was an illegitimate exercise of state power.⁷ The Court defined the extent to which parental rights exist under the Fourteenth Amendment:

[liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children⁸

Liberty rights under the Fourteenth Amendment are implied fundamental rights which may not be arbitrarily interfered with by state legislatures.⁹ The Supreme Court enunciated a doctrine

2. 606 N.Y.S.2d 259, 268 (N.Y. App. Div. 1993).

3. *Id.* at 268.

4. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (holding that private school owners may assert the rights of prospective students and their parents, where the Fourteenth Amendment gives parents a liberty interest in directing their child's education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (asserting that the First and Fourteenth Amendments preclude states from barring children from learning a foreign language of which their parents approve). Cf. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting that removing children from the custody of their parents, when the State shows a legitimate interest in protecting the children's welfare, does not violate parental rights under the Fourteenth Amendment).

5. 262 U.S. 390, 390 (1923) (recognizing that the Fourteenth Amendment affords parents a liberty interest in caring for their children free from state interference).

6. *Id.* at 400 (defining the liberty right of parents to include matters such as religion, morality and the education of children).

7. *Id.* (holding that the statute unconstitutionally infringed upon the parents' liberty rights under the law of due process).

8. *Id.* at 399.

9. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (stating that fundamental or liberty rights, such as those dealing with sex, marriage or child-bearing, fall within the broad category of the "right to privacy"). This right to privacy is constitutionally protected even though it is not explicitly stated in the Constitution. *Id.* at 485. A general rule from *Griswold* is that where a "right to privacy" exists, any governmental interference with such a right subjects the interference to strict scrutiny, thereby requiring a compelling justification by the state in order for its interference to be constitutional. *Id.* at 479.

requiring statutes to bear a reasonable relation to some purpose within the competency of the state to effect.¹⁰ Statutes must effectuate a demonstrated, compelling state interest if they interfere with individuals' liberty interest rights.¹¹ Since *Meyer*, parents have enjoyed a well-recognized liberty interest in rearing and educating their children in accordance with their own views.¹² A state can intrude on this historic right only by showing an overriding necessity.¹³

Twenty years later, in *Prince v. Massachusetts*,¹⁴ the Court reaffirmed the liberty interest established in *Meyer*, but carved out exceptions to the protected private realm of family life, the parents' domain. In *Prince*, a woman gave a minor in her custody magazines to sell in violation of a Massachusetts child labor statute.¹⁵ The facts juxtaposed a guardian's right to control her child against the state's interest in overseeing the welfare of that particular child. Accommodating the earlier principle, while recognizing the need for state intervention in some instances, the Court altered its conventional supposition.¹⁶ *Prince* redefined the situations in which parents' rights may be regulated in the public interest, and stated:

10. See *Meyer*, 262 U.S. at 399-400 (declaring that arbitrary legislative action is subject to judicial review).

11. See *Alfonso*, 606 N.Y.S.2d at 265 (noting that a showing of overriding necessity must be demonstrated by a state before legislation which interferes with a fundamental right can be constitutionally upheld).

12. See generally *Griswold*, 381 U.S. at 482 (asserting that the state may not limit the range of knowledge available to minors). The *Griswold* Court reaffirmed the First and Fourteenth Amendment rights to study a foreign language as addressed in *Meyer*, 262 U.S. at 401, and expanded this logic to grant minors First Amendment protection to receive a "spectrum of available knowledge." *Griswold*, 381 U.S. at 482.

13. See *Alfonso*, 606 N.Y.S.2d at 267 (recognizing that AIDS presents a public health concern of such magnitude that the state has a compelling interest in distributing condoms to sexually active teens in order to prevent the spread of this disease). *Contra* Donald Schoemaker, *Sex Education: The Dissemination of Family Planning Services and Contraceptives in Public Schools*, 8 J. LEGAL MED. 587, 596 (1987) (claiming that the Supreme Court's treatment of parents' fundamental liberty interest is really a way to control children's ideas about sex).

14. 321 U.S. 158 (1944).

15. *Id.* at 161 (citing chapter 149, section 80 of the General Laws of the Commonwealth of Massachusetts, which states that anyone who provides a minor with prohibited material and knows that minor will, or encourages that minor to, sell the material in violation of child labor proscriptions "shall be punished by a fine . . . or by imprisonment . . . or both." Section 81 prescribes substantially lower fines and imprisonment penalties to the parents of such minors.).

16. See *Prince*, 321 U.S. at 166-70 (asserting that the state has authority over children's activities because the family is not beyond regulation if doing so would be in the public interest). See generally *Davis v. Beason*, 133 U.S. 333 (1890) (declaring that bigamy and polygamy destroy the sanctity of marriage and family and thus are subject to the state's punishment). *Cf.* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (noting that the constitutional protection accorded to words and acts is based on "proximity and degree" to inciting a prohibited behavior).

[a]cting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.¹⁷

Meyer and *Prince* together establish the fundamental right to raise a family, but clearly leave room for a state to intervene on behalf of the child's best interest if the state believes the parents are treating a minor in an unlawful manner.

Following *Meyer* and its progeny, the *Alfonso* court decided that the condom distribution program impermissibly trespassed on petitioners' parental rights without a compelling reason for the state to do so.¹⁸ The *Alfonso* court held that the condom distribution component of New York's sex education curricula was unconstitutional, because it forced parents to obviate their fundamental right to directly control the sexual activities of their children.¹⁹

Arguably, the *Alfonso* rationale is flawed because the program is voluntary, and as such, does not interfere with parents' right to care for their minor child in accordance with individual family values.²⁰ Forcing students to be the recipients of condoms would place the parents' rights in jeopardy. Merely making condoms available on request does not infringe upon parents' ability to care for their children as guaranteed by the Constitution.²¹

17. *Prince*, 321 U.S. at 166.

18. *Alfonso*, 606 N.Y.S.2d at 265 (holding that the Constitution permits parents to have sole control over their child's sexual behavior, and absent a compelling state interest, the condom distribution program conflicts with this well-recognized liberty interest).

19. See *id.* (commenting that the voluntary nature of the program did not cure the constitutional infirmity).

20. See Karl J. Sanders, *Kids and Condoms: Constitutional Challenges to the Distribution of Condoms in Public Schools*, 61 U. CIN. L. REV. 1479 (1993). Sanders argues that:

[b]oth *Alfonso* and *Doe* were correct to conclude that a state does not infringe upon parental rights where it merely provides minors with an opportunity to exercise their own free will. Objections to voluntary programs inherently derive from a failure to legislate parental concerns. Thus, the issue is not constitutionally suspect state action, but rather the legislative prerogative of state inaction.

Id. at 1509-10. Sanders' article was written in support of the lower court's opinion regarding condom distribution in the New York public school system, before *Alfonso* was appealed. The lower court rejected all of the parents' claims. Sanders' comment explores the feasibility of future challenges to voluntary condom distribution programs and concludes that such claims are difficult to pursue because the issues are purely legislative and political, rather than constitutional.

21. See *Alfonso*, 606 N.Y.S.2d at 260 (Eiber, J., dissenting) (noting that the difference between a voluntary and compulsory program is the determining factor in whether a viable claim can be made by the parents).

A. *Alternative Analysis of Condom Distribution Programs from Doe v. Irwin*

A close examination of another condom distribution program delineates how the New York court could have found the program to be constitutionally valid if it had chosen to follow a line of cases suspiciously neglected or erroneously interpreted by the *Alfonso* majority.²²

In *Doe v. Irwin*,²³ parents brought a class action suit against a family planning center, alleging that the practice of distributing contraceptives to unemancipated minors, absent parental consent, violated their constitutional rights.²⁴ The district court held that distributing contraceptives to minors without parental notification was an infringement upon the constitutional rights of the parents.²⁵ The United States Court of Appeals for the Sixth Circuit overturned the district court and held that the practices of the center were not violative of any constitutional rights of the parents.²⁶ This paper argues that the Sixth Circuit court's analysis in *Doe* should have been followed by the *Alfonso* court.

The facts in *Doe*, in brief, are as follows: a family planning center located in Lansing, Michigan, operated by the Ingham County Health Department and under contract with the Michigan Department of Public Health, provided services to both adults and minors.²⁷ The program permitted minors to come to the center without parental consent or notification.²⁸ The center also prescribed and distributed

22. See Eve W. Paul & Dara Klassel, *Minors' Right to Confidential Contraceptive Services: The Limits of State Power*, 10 WOMEN'S RTS L. REP. 45 (1987) (arguing that condom use is a crucial component of teen pregnancy prevention). The article quotes from a study comparing adolescent pregnancy rates of the United States with five other developed countries, which have free and confidential services to teens, and reports that:

[u]nfortunately, the encouragement of 'diligent contraceptive use' and the removal of such barriers to services as lack of confidentiality and cost has been a public policy goal which has suffered from the shifting political tides of the late twentieth century.

Id. at 45-46. See also Jones, Forrest, Goldman, Henshaw, Lincoln, Rostoff, Westoff & Wulf, *Teenage Pregnancy in Developed Countries: Determinants and Policy Implications*, 17 FAM. PLAN. PERSP. 53 (1985) (noting that the rate of teen pregnancy in the United States is higher than in any other developed nation, even though teen sexual behavior patterns in these nations are parallel); *The Next Contraceptive Revolution*, 18 FAM. PLAN. PERSP. 19 (1986) (claiming that 80% of teenage pregnancies in the United States are unintended).

23. 615 F.2d 1162 (6th Cir. 1980).

24. *Id.* at 1167 (noting parents' Fourteenth Amendment rights "to the care, custody and nurture of their children").

25. *Doe v. Irwin*, 428 F. Supp. 1198 (W.D. Mich. 1977).

26. *Doe*, 615 F.2d at 1168.

27. *Id.* at 1163.

28. *Id.*

contraceptives to minors without parental consent.²⁹ The center did not perform abortions or sterilizations and would not insert an IUD without parental consent.³⁰ All minors who wanted contraception had to attend a weekly "rap session" explaining birth control methods and the responsibilities connected to being sexually active.³¹ During the educational sessions, counselors encouraged minors to discuss their sexual activities and interests with their parents.³² Counselors offered advice on how to communicate about this sensitive topic with parents.³³ The administrator told the court that employees "do not advocate that unmarried teenagers become sexually active. However, they try to deal with individuals 'where they are' and promote their physical and psychological well-being."³⁴

Factually, the program at the center did not differ significantly from the voluntary condom distribution program implemented in New York. The high school program had two components.³⁵ The first consisted of classroom instruction on various aspects of HIV/AIDS and birth control.³⁶ Instructors stressed abstinence.³⁷ This phase was mandatory, but included an opt-out provision where parents could request that their child be left out of the classroom instruction because they provided this information at home.³⁸

The second component of the health education program allowed high schools to make condoms available to students upon request.³⁹ Trained professionals gave the students counseling on the proper use of condoms and discussed problems related to their misuse.⁴⁰ This second component of the health education program was voluntary. Students were not required to participate, nor were they penalized for not participating.⁴¹ The condom distribution program, however, did not have an opt-out or notification provision for parents, because the

29. *Id.*

30. *Id.*

31. *Doe*, 615 F.2d at 1163 (detailing the topics covered and the purpose of the educational groups).

32. *Id.* at 1164 (describing how counselors invited inquiring parents to attend "rap sessions" and offered to help minors discuss sexuality with their parents).

33. *Id.*

34. *Id.*

35. *See Alfonso*, 606 N.Y.S.2d at 261 (describing how the expansion of the health education program was designed to provide more knowledge and precautionary measures).

36. *Id.* (noting that the required curricula included lessons on means of HIV transmission and methods of prevention).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Alfonso*, 606 N.Y.S.2d at 261.

41. *Id.*

Board felt it would compromise the anonymous nature of the program.⁴²

B. The Doe Court Rejects Alfonso Parents' Due Process Claim

The condom distribution programs in *Doe* and *Alfonso* were identical except for the setting, yet two courts came to drastically different conclusions on the same issues. The Sixth Circuit Court of Appeals, in *Doe*, rejected the lower court's holding that distributing contraceptive devices to minors without parental consent was unconstitutional.⁴³ The *Doe* court of appeals distinguished the exact same cases cited by the *Alfonso* petitioners in their argument for parental rights to prevail. The Sixth Circuit noted that in those cases, the "state was either requiring or prohibiting some activity."⁴⁴

The Supreme Court cases cited by the complaining parents in both *Doe* and *Alfonso* were inapplicable, because parents had no right to be notified of their children's voluntary decisions.⁴⁵ The court found no constitutional intrusion nor deprivation of liberty meriting any protection under the United States Constitution in *Doe*.⁴⁶ The constitutional debate over whether or not the high school program intruded on the relationship between parent and child should similarly have been narrowed solely to the question of compulsion, or lack thereof.⁴⁷ Without state compulsion for action or inaction, no exertion of police power can be said to have unconstitutionally undermined a guaranteed liberty interest. The distinguishing factor

42. *Id.* at 268-69 (Eiber, J., dissenting) (discussing the former Chancellor's decision to supplement HIV/AIDS education with condom availability on a voluntary basis). The Board specifically elected not to allow disapproving parents the option to deny their child access to the program, feeling that these children needed the service the most and an opt-out provision might "limit participation in the program as to make it ineffective." *Id.*

43. *Doe*, 615 F.2d at 1168.

44. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

45. See also Ralph D. Mawdsley, *Parental Rights and Public Education*, 59 Educ. L. Rep. (West) 271 (1990) (arguing that the reformulation of parental rights in relation to education in the last half-century grants states and students more rights than previously experienced because the judiciary no longer has complete faith in parents' choices). Mawdsley states that "there is also a clear awareness existing that public schools have an inculcative function that at some point may conflict with the parents' views, perhaps not so much regarding an individual child as children generally in the community." *Id.* at 273.

46. *Doe*, 615 F.2d at 1168 (asserting that parents' rights have not been unconstitutionally violated in the absence of a notification provision. The state, not the federal courts, should decide whether parents are involved in every stage of minors' decision-making process.).

47. *Id.* at 1169 (finding no constitutional requirement for family planning clinics to notify parents when their children use their services. The court asserts that mandating parental involvement is antithetical to the purpose of federally funded clinics as a confidential reproductive resource.).

of compulsion was not present in *Alfonso*, nor in *Doe*, as the court properly ascertained.

In *Doe*, the Court of Appeals for the Sixth Circuit found the lower court erred in its analysis of the three rights asserted: the parents' right to the care and nurturance of their children; the minors' right to personal privacy; and, the state's interest in public health and welfare.⁴⁸ The lower court wrongly held that the parental right was strong enough to "require the state to impose a limitation on the rights of minors which the state had not chosen to impose."⁴⁹ Without a compulsory quality, there was no actual right of the parents upon which the state could have trampled, because the parents were still free to exercise control over their children.

The voluntary nature of the New York program should have indicated to the *Alfonso* court that there was no deprivation of parents' liberty interest. The high school, like the family planning center in *Doe*, had not imposed any compulsory demand on the parents. "There is no requirement that the children of the plaintiffs avail themselves of the services offered . . . and no prohibition against the plaintiffs' participating in decisions of their minor children on issues of sexual activity and birth control."⁵⁰ In *Doe*, the court did not allow voluntary access to contraception to be swept into the same category as compulsory programs, which might have infringed upon an asserted liberty interest.⁵¹ By viewing the condom distribution program as an intrusion on a fundamental right, the *Alfonso* court ignored precedential doctrine and unnecessarily extended the liberty interest of parents.⁵² Sending children into an environment where

48. See *id.* at 1167 (noting that the lower court gave improper latitude to parents' rights over those of minors and the state).

49. *Id.* at 1167.

50. *Id.* at 1168.

51. The decision in *Doe* noted that, "[t]he question in this case is not whether a state may impose a condition which would limit the right of privacy of the minors whose interests are involved. Rather, it is whether the Constitution requires such a condition." *Doe*, 615 F.2d at 1169.

52. See *Alfonso*, 606 N.Y.S.2d at 273 (Eiber, J., dissenting) (stating that the constitutionality of condom distribution programs, absent a parental consent provision, is no longer an issue for the court to decide. The Supreme Court already addressed the issue of state and federally funded condom distribution programs and found such services constitutional, even when parental consent is not required.). The program is constitutional according to *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), which concluded that a New York statute criminalizing distribution of contraceptives to minors infringes upon minors' constitutional right to privacy in decisions affecting procreation. State interest and parental rights do not outweigh minors' rights to use "nonhazardous contraceptives." *Id.* at 693. The condom distribution program is also constitutional according to *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980), which declared that a voluntary birth control program for minors, imposing no compulsory requirements, does not interfere with parental rights of care, custody and control.

condoms can be obtained voluntarily does not constitute a deprivation of an implied fundamental right.

The argument made by the parents that laws *require* them to send their children to school has some merit.⁵³ On the other hand, condoms, unlike the prescriptive contraceptives at issue in *Doe*, can easily be purchased at a local drug store and are a noninvasive method of birth control. Condoms are in vending machines, supermarkets, federally funded clinics and other fora.⁵⁴ Sending minors into an environment where condoms were *merely* available, as opposed to mandatory, would put into question every place a parent allows a child to go outside of the home. The program did not force parents to subjugate their influence over their childrens' behavior, or surrender a constitutional right, by placing the children in the same building where condoms were available upon request. Parents could instruct their children not to participate in the program and not to request condoms.⁵⁵

Because the program assessed in *Alfonso* imposed no compulsory requirements on students, the parents' liberty interest in guiding their childrens' decisions about sexual activity and procreation, remained intact. The voluntary nature of the program is akin to other means of obtaining condoms (i.e., clinics, commercial sales) where parents' rights to raise their children according to their own values are not affected. Voluntary services provided by clinics and schools equally implicate the rights of parents to nurture and control their childrens' decisions. Yet, the two courts' inconsistent reasoning in this area leaves the reader to wonder why the court, in *Alfonso*, decided to take a firm stand and strike down the regulatory decision of the Board of Education on condoms—the least invasive, safest and most available form of birth control.

53. See *Alfonso*, 606 N.Y.S.2d at 266 (noting that in *Doe*, parents were not forced to send their children to the center, as they must send them to school).

54. Lawrence D'Angelo & Kevin Neil, *Not Just a Gay Disease*, WASH. POST, Jan. 20, 1994 (Letters to the Editor) at A22 (responding to an article written by George F. Will which suggested that condom availability outside the school eliminated the need for programs in public schools). D'Angelo and Neil assert that:

[c]ondoms made available in the context of an education program that includes counseling, information about the virus and how it is transmitted, instruction on condom selection and proper usage are essential to the survival of sexually active teens. These programs . . . make available not only condoms but also valuable information to both sexually active teens and teens who choose to delay sexual activity until later in life. This information is not available in drugstores.

55. See *Alfonso*, 606 N.Y.S.2d at 267 (Eiber, J., dissenting) (arguing that petitioners were not losing control or influence over their children in their own homes, where the Fourteenth Amendment guarantees them the most protection from state interference in the family).

II. MINORS' DUE PROCESS RIGHTS AND CONTRACEPTION

The *Alfonso* court held that the program was unconstitutional based on an analysis that mainly focused on the parents' due process rights. However, the evaluation of the situation was incomplete without probing into the corresponding rights of the minors, protected under the same implied liberty interest of the Fourteenth Amendment.⁵⁶ The students, while not a party to the litigation,⁵⁷ were directly implicated by the court's decision to place their parents' interest in controlling their sexuality above their own constitutional rights.⁵⁸ The court erred by avoiding the constitutional doctrine that minors possess a distinct liberty interest guaranteed by the Fourteenth Amendment.

Historically, cases involving parental consent issues have focused on a minors' right to have an abortion.⁵⁹ These cases have involved a balancing of the competing rights of the state and the rights of

56. See *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975) (holding that the fundamental right to have an abortion applies to minors, and that parental and spousal consent requirements are unconstitutional). Following *Roe v. Wade*, 410 U.S. 113 (1973), the *Poe* court chose to "look to the nature of the right itself in order to determine its availability to minors." *Poe*, 517 F.2d at 790. Since the Supreme Court has not spoken specifically to the application of the *Roe* standard to minors' privacy rights, the *Poe* court chose to examine the repercussions of denying minors their rights under the Fourteenth Amendment and concluded that: "[t]he magnitude of the minor's interest in avoiding these consequences suggests that the developmental differences between adults and minors do not warrant denying constitutional protection to the minor's abortions." *Poe*, 517 F.2d at 791.

57. See *Alfonso*, 584 N.Y.S.2d at 408 (explaining that parents of unemancipated minor students at local high schools brought suit against the Board of Education of New York City).

58. See *Doe*, 615 F.2d at 1166 (explaining that minors do possess a constitutional right to privacy and citing: *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (discussing how the Fourteenth Amendment protects minors as well as adults); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692-93 (1977) (noting that an adult's right to privacy in obtaining contraceptives also applies to minors); and, *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 75 (1976) (stating that parental interest in terminating a minor daughter's pregnancy is not greater than the daughter's right to privacy). Cf. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (concluding that the right of privacy includes abortion because of the resultant harm of state restrictions on this personal liberty).

59. See, e.g., *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 (1983) (holding that a city ordinance requiring parental consent, with regard to second trimester abortions, is unconstitutional because state interests did not outweigh minors' rights to abortion); *Bellotti v. Baird*, 428 U.S. 132, 151 (1976) (*Bellotti I*) (suggesting that a statute requiring parental consent without alternatives to obtaining abortion is a "most serious barrier" to pregnant minor's options), 443 U.S. 622, 623 (1979) (*Bellotti II*) (holding that a statute requiring pregnant minors to obtain parental consent or judicial approval upon parental notification places an unconstitutional burden upon minors seeking abortions). Cf. *Planned Parenthood Ass'n of Missouri v. Ashcroft*, 462 U.S. 476, 490 (1983) (noting that a statute requiring parental consent for minors' abortions is constitutional as long as it includes a provision allowing judicial consent to substitute for that of her parents). But see *H.L. v. Matheson*, 450 U.S. 398, 417 (1981) (claiming that a minor who desires an abortion without parental consent, but gives no reason for overriding this statutory requirement, has no standing to challenge the law's validity).

minors, with the parents' rights playing a secondary role.⁶⁰ Unfortunately, the court in *Alfonso* did not apply the balancing test under this rubric of constitutional law. The rights of the parents took on a primary role, while the rights of the minors were overlooked. Furthermore, since the parents in *Alfonso* made it expressly known that an opt-out provision would satisfy their objections to the program and terminate further litigation, the court chose to go along with the parents.⁶¹

A. *Evaluation of Cases Involving Parental Consent Provisions*

Alfonso v. Fernandez is the only case that examines the issue of whether condom distribution programs may constitutionally be conditioned upon parental approval. As of 1993, thirty-six school districts, or eight percent, have condom distribution programs in effect.⁶² In eighty percent of the school districts that have a health education instruction exemption provision, less than one percent of parents chose to remove their child from such classes.⁶³ Although direct parental consent is a more stringent requirement than an opt-out provision, both methods require that parents be notified of the program and given an opportunity to exempt their child.

The Supreme Court addressed the issue of whether minors' privacy rights encompassed the right to have an abortion without parental consent in *Planned Parenthood of Central Missouri v. Danforth*.⁶⁴ The Court held that a Missouri statute requiring a minor to procure parental permission before having an abortion did not withstand constitutional scrutiny.⁶⁵ Even though the law may "subject minors to more stringent limitations than are permissible with respect to

60. See *Hodgson v. Minnesota*, 497 U.S. 417, 436 (1990) (stating that when a "statute unquestionably places obstacles in the pregnant minor's path to an abortion," the burden of proving its constitutionality is on the state).

61. *Alfonso*, 584 N.Y.S.2d at 411 (proposing that a prior consent provision would cure the claimed constitutional violation of parents' Fourteenth Amendment right). See Eugene C. Bjorklun, *Condom Distribution in the Public Schools*, 91 EDUC. L. REP. (West) 11 (1994) (asserting that the new Chancellor, Ramon C. Cortines, changed the program to conform to the court's dictates. A letter is now sent to all parents, describing the condom distribution program, along with an opt-out form. School personnel must adhere to parents' requests and cannot provide condoms to students who request them if their parents do not consent.).

62. See Bjorklun, *supra* note 61, at 11 (citing Sarah E. Samuels & Mark D. Smith, eds., *CONDOMS IN THE SCHOOLS* 131-32 (The Henry J. Kaiser Family Foundation, 1993)). While more open and frank education about sex and condoms is needed to encourage sexually active students to use condoms, some school districts have gone even further than just talking. Many school districts have instituted condom distribution programs in the schools.

63. Bjorklun, *supra* note 61, at 11.

64. 428 U.S. 52 (1976).

65. *Id.* at 74 (rejecting both spousal and parental consent requirements).

adults,"⁶⁶ it remains that a third party does not have a constitutional right to veto another individual's decision and right of self-determination, even if the party seeking an abortion is a minor.⁶⁷ "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."⁶⁸

Appellants in *Danforth* persuasively illustrated that minors in Missouri were not required to obtain parental consent for other medical services, such as treatment for venereal diseases, drug abuse and pregnancy consultation. In fact, "in Missouri a minor legally may consent to medical services for pregnancy (excluding abortion, venereal disease, and drug abuse)."⁶⁹ The restrictions on minors were unjustified and the state had no significant interest in conditioning abortion for minors on permission from a parent where the same was not required for adults.⁷⁰ Further, the *Danforth* Court asserted that any state interest in strengthening the family and promoting parental authority did not justify the restriction on minors' privacy rights.⁷¹

The year following *Danforth*, the Supreme Court, in *Carey v. Population Services International*, reviewed the constitutionality of a New York statute prohibiting distribution of nonprescriptive contraception to minors under the age of sixteen.⁷² After revisiting the issue of the extent of minors' rights in relation to procreation, the Court reaffirmed the proposition that "[s]tate restrictions inhibiting privacy

66. *Id.* at 72.

67. *Danforth*, 428 U.S. at 73-74 (noting that minors are sufficiently mature to make tough and intelligent choices with the help of a physician and without succumbing to parents' wishes if the two conflict).

68. *Id.* at 74.

69. *Id.* at 73 (emphasizing minors' autonomy in other areas of health services, including some which, by definition, are part of reproductive services). See MO. REV. STAT. §§ 431.061-431.063 (Supp. 1975) (explaining what medical services minors may legally consent to).

70. See *Danforth*, 428 U.S. at 72-76 (holding that the state of Missouri could not "impose a blanket provision . . . requiring the consent of a parent . . . as a condition for abortion of an unmarried minor . . . [because] the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto, . . ." at all times, regardless of the physician and minor patients interests). *Id.* at 74.

71. *Id.* at 75 (arguing that giving a parent veto power will destroy the family structure, as opposed to building unity and closeness).

72. 431 U.S. 678, 700 (1977) (ruling on the only case to reach the Supreme Court dealing with contraceptives, and setting rules for their regulation and advertisement). A condom distributor challenged the constitutionality of a New York statute prohibiting sales to anyone under sixteen. The statute set forth stringent regulations for buying and selling condoms, wherein only a licensed pharmacist could distribute contraceptives and all advertising and displays were banned. The Supreme Court found the statute unconstitutional because it unfairly burdened a fundamental right—the decision to bear or beget a child.). See also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a woman's right to an abortion is fundamental and can only be limited when a state's interest becomes compelling); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that if right to privacy means anything, it is the right to decide whether to "bear or beget a child").

rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'⁷³ *Carey* upheld minors' constitutional right to obtain contraception, stating that:

[s]ince the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a *fortiori* foreclosed.⁷⁴

Contrasting the implications of receiving abortions and using contraceptives, Justice Brennan noted that: "[t]he State's interests in protection of the . . . pregnant minor, and in protection of the parental life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive."⁷⁵

Minors' privacy rights in the matters of both abortion and birth control have been afforded protection under the privacy doctrine.⁷⁶ The *Danforth* Court found the parental interest in their child's reproductive decisions "no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."⁷⁷ Minors have an independently recognized right to make decisions relating to procreation without third party intervention.⁷⁸ Parents cannot stop their children from asserting their own constitutionally protected right in the absence of a compelling reason.⁷⁹

73. *Carey*, 431 U.S. at 693 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976)).

74. *Carey*, 431 U.S. at 694.

75. *Id.* at 694 (Brennan J., joined by Stewart, Marshall, and Blackmun, JJ.).

76. *Doe*, 615 F.2d at 1166 (stating that:

[i]n a series of cases dealing with laws affecting the right to abortion, the Supreme Court has held consistently that a woman's decisions concerning child-bearing are within the most intimate area of personal privacy. E.g., *Roe v. Wade*, 410 U.S. 113, 152 . . . (1973); *Whalen v. Roe*, 429 U.S. 589, 599-600 . . . (1977). One of the first explicit recognitions of the right of privacy came in a case dealing with a statute which prohibited the use of contraceptives. *Griswold v. Connecticut*, 381 U.S. 479 . . . (1965). Though the state has somewhat broader authority to regulate the conduct of children than that of adults, minors do possess a constitutionally protected right of privacy. *Bellotti v. Baird*, 443 U.S. 622 . . . (1979); *Carey v. Populations Servs. Int'l.*, 431 U.S. 678, 692-93 . . . (1977) . . .).

77. *Danforth*, 428 U.S. at 75.

78. See generally *Carey*, 431 U.S. at 678 (noting that the right to privacy afforded to adults when making a decision about having a child is recognized as a right of minors as well. States may not give a third party absolute control over such decisions in all instances.); *Danforth*, 428 U.S. at 75 (invalidating a statute that required parental consent for a female under the age of eighteen, who was seeking an abortion, because it mandated consent by a third person without a sufficient justification for such a requirement).

79. See *Carey*, 431 U.S. at 686 (citing *Roe v. Wade*, 410 U.S. 113 (1973), the Court states that "where a decision as fundamental as that [of] whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."); *Poe*, 517 F.2d at 791 (holding that minors

Subsequent to *Carey*, in *Bellotti v. Baird*,⁸⁰ the Supreme Court pronounced that a minor must be able to obtain an abortion in the absence of parental consent.⁸¹ Thus, a judicial bypass option was required where states attempted to limit the rights of minors because the abortion decision could not wait until the age of majority.⁸² Applying the *Carey* rationale, unwanted pregnancy was determined to be an unnecessarily harsh punishment for a female teenager who engaged in sexual activity and whose parents denied her the choice to have an abortion because it was contrary to their personal beliefs.⁸³

A state cannot impose a parental consent requirement where a minor chooses to terminate her pregnancy without also offering a viable alternative. States cannot constitutionally block a minor's choice to avail herself of the judicial bypass option, for example, instead of obtaining parental consent.⁸⁴ While the Supreme Court has not specifically determined whether a state can constitutionally require parental notice before minors receive birth control, the Court has held that states have more of a vested interest in minors' decision

possess the fundamental right to an abortion equal to that of adults). The court stated that fundamental rights can be limited only by a compelling state interest and cited *Roe v. Wade*, 410 U.S. 113 (1973), *Harper v. Virginia State Bd. of Elections*, 338 U.S. 663 (1966), *Dunn v. Blumstein*, 405 U.S. 330 (1972), and, *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) in support of this proposition.

80. 428 U.S. 132 (1976).

81. *Id.* (class action suit brought against the Attorney General and District Attorneys of Massachusetts challenging a statute that dictated the type of consent required in order for an unmarried woman under the age of eighteen to have an abortion. The appellees claimed that the statute violated their due process and equal protection rights under the Fourteenth Amendment. Parental consent was at the heart of the challenge. The Supreme Court held that because the statute could be interpreted so as to allow the minor to get judicial consent without notifying her parents, based on the minor being capable of consenting given her own best interests, then the district court should not have decided the constitutional issue.).

82. See *Wynn v. Carey*, 582 F.2d 1375, 1389 (7th Cir. 1978) (noting that "[b]ecause of the fundamental nature of rights involved, because of the lack of legal sophistication of minors generally, and because of the urgency inherent in an abortion decision itself, it is imperative that the procedure [for a judicial bypass] be spelled out in detail . . ."). More recently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 431 U.S. 678 (1992) the Supreme Court allowed Pennsylvania to enact a parental consent provision in the abortion laws, but included a judicial bypass option for minors under certain circumstances.

83. See also *Carey*, 431 U.S. at 695 (emphasizing that sexual activity should not be regulated by creating a public policy which discourages sexual behavior. The state may not assign a value to private choices by regulating the availability of contraception.); *Doe*, 615 F.2d at 1167 (discussing the protection of young females from the dangers of unwanted pregnancies).

84. See *Wynn*, 582 F.2d at 1386-88 (holding that a statute which requires parents to be informed of their daughter's decision to terminate her pregnancy is overinclusive, underinclusive and unconstitutionally burdensome on minors). "The minor, accordingly, is in a no-win situation. If she loses the judicial proceedings, it will be a personal blow, and scarcely a redemption of the ill feeling and tension that undoubtedly resulted from her parents' refusal of consent and her taking them to court. If she wins, according to defendants' own expert, she is likely to find herself in an even worse position." *Id.* at 1389 (quoting Judge Aldrich in *Baird v. Bellotti*, 450 F. Supp. 997, 1002 (D. Mass. 1978)).

to have an abortion than to receive contraceptives.⁸⁵ Logically, one can conclude that a minor who wants nonprescriptive contraceptives, such as condoms, should not be required to obtain parental consent if a minor wanting an abortion has the right to bypass such permission because of her own protected liberty guarantee. A sexually active minor denied contraception without parental consent is similar to a pregnant minor denied an abortion for the same reason. Therefore, minors have the right to receive contraception without their parents' knowledge or permission, unless the state, not the court, determines that parental involvement is essential and relates to some purpose it seeks to further.

*B. The Lower Court's Analysis of the Condom Distribution Program
Absent a Parental Consent Provision*

Prior to enacting the condom distribution program, an opt-out provision was discussed and voted down by the Board.⁸⁶ It seems as though the Board concluded that an opt-out provision would frustrate one important purpose of the distribution program—anonymity. Alternatively, the Board proactively encouraged parental participation in various aspects of the planning, implementation and continuation of the program.⁸⁷

In light of the Board's position, the lower court declined to address the issue of whether a parental opt-out provision passed constitutional scrutiny, demonstrating deference to the Board's authority.⁸⁸ The court noted that:

[i]t is not the role of the court to set policy on educational programs; such is the authority given to [the Board] by law [C]ourts should not usurp the administrative functions . . . [of the Board]. Education officials are ordinarily vested with wide discretion in the management of school affairs . . . [and] resolution of school conflicts⁸⁹

85. See *Carey*, 431 U.S. at 694 (commenting about the abortion decisions minors' face, and the state's interest in that decision).

86. *Alfonso*, 584 N.Y.S.2d at 411 (holding that an opt-out provision is not an issue to be decided in this case because the Board did not include it in the program's policy).

87. *Id.*

88. *Id.*

89. *Id.* See also Education Law § 2590-(g)(1) (setting forth the role of courts in deferring to the administrative decisions of school officials); *Matter of Board of Educ. of New York v. Ambach*, 517 N.E.2d 509 (1987) (holding that the Commissioner of Education and other education officials maintain wide discretion in operating the school system); *Matter of Board of Educ. of New York v. Nyquist*, 439 N.E.2d 359 (1982) (allowing for deference to school board officials in the management of the school system, given practical and political issues arising from that management).

The Board of Education seemingly devised a program which was believed to be responsive to the needs of their student body. Before mandating a change in the structure of the condom distribution program, such as adding an opt-out provision, "petitioners must show some right to it as a matter of law."⁹⁰ Finding no constitutional entitlement on behalf of the parents, the court felt it must refrain from legislating an opt-out provision into the program.⁹¹ In dicta, the majority noted that the adoption of a veto provision was not, as parents contended, a panacea for the distribution program because exposure to condoms in the school would continue regardless.⁹²

*C. The Appellate Court's Analysis of the Condom Distribution Program
Absent a Parental Consent Provision*

The appellate court, reversing the lower court, held that the New York public schools were prohibited from distributing condoms to minor students without either a parental consent or opt-out provision.⁹³ Without specific statutory authority for the condom distribution program, the appellate court found that it was outside the scope of their power to constructively legislate.⁹⁴ Oddly, the lower court upheld the program for the same reason.⁹⁵

In order to reach a conclusion so different from that of the lower court, the appellate court found that the program was a health service, not an educational program, and was therefore controlled by section 2504 of the Public Health Law of New York.⁹⁶ This provision presumed the incapacity of minors to make health services decisions

90. *Alfonso*, 584 N.Y.S.2d at 411.

91. *Id.* at 411 (holding that judicial activism in this area is outside the role of the court. Policy decisions regarding education cannot be altered to a more desirable one, as determined by the court. Parents have no "right to tailor public school programs to individual religious preferences," citing *Ware v. Valley Stream High Sch. Dist.*, 550 N.E.2d 420 (N.Y. 1989); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)).

92. *See Alfonso*, 584 N.Y.S.2d at 412 (citing a United States Court of Appeals decision in support of the court's conclusion that a voluntary birth control program is not coercive and does not take away parental control over the care of their children).

93. *See Alfonso*, 606 N.Y.S.2d at 268.

94. *See id.* at 265 (holding that a state law authorizing this particular program must exist to have a legitimate exception to the common-law practice of parental consent for medical procedures). The court viewed the program within the ambit of health services, not educational services.

95. *Alfonso*, 584 N.Y.S.2d at 409.

96. N.Y. PUB. HEALTH LAW § 2504 (McKinney 1972) (codifying some of the common-law exceptions to the general incapacity of minors). The parental consent requirement is abolished for "medical, dental, health and hospital service." *Id.* It is interesting to note that section 2504 delineates the exceptions to the parental consent requirement—it does not control this particular condom distribution program. The court does not allow for such a program because condoms are not one of the exceptions.

absent parental consent.⁹⁷ No specific exception for a condom distribution program was listed in the health service code, so the court held that no authority for such program existed.⁹⁸ The court read the statute literally, holding that it was not their job to undermine the legislature.⁹⁹ Without a specifically delineated exception for condoms, the program must cease to continue.¹⁰⁰

The court listed the various state laws which have been enacted to govern minors' access to family planning services without parental consent, such as the Social Security Act, Medicaid and Title X of the Public Health Act to emphasize their point:

[w]hile the purpose of the condom availability component of the program may be commendable, the Legislature has not enacted to abrogate the common-law rule and to authorize the New York State Commissioner of Education or the respondents to direct or permit the delivery of such a health service to minor, unemancipated high school students in public buildings without some parental role through opt-out or consent.¹⁰¹

Parental consent was not required for minors in the aforementioned categories or programs because they had statutory authority. Other statutorily enacted exceptions to requirements of parental consent include minors' right to obtain HIV-related tests, and treatment of sexually transmitted diseases.¹⁰²

D. Manipulation of Minors' Rights by the Appellate Court

The appellate court's opinion in *Alfonso* found the condom distribution program unconstitutional absent a parental opt-out provision.¹⁰³ The court framed the issue over access to condoms in the public schools as one which constitutionally demanded an inquiry into the parental consent option.¹⁰⁴ However, the appellate court

97. *Alfonso*, 606 N.Y.S.2d at 263.

98. *Id.* (agreeing with petitioners' categorization of the program as a health service. The court did not find an exemption which they felt incorporated the program and thus conditioned its continuation upon parental consent.).

99. *Id.* at 264.

100. *Id.*

101. *Id.*

102. *Alfonso*, 606 N.Y.S.2d at 264.

103. See *supra* note 2 and accompanying text.

104. *Alfonso*, 606 N.Y.S.2d at 268 (holding that "the respondents' plan to dispense condoms to unemancipated minor children without the consent of their parents or guardians, or an opt-out provision, violates the civil rights of the parent petitioners and similarly situated parents or guardians under the substantive due process clauses of the Fourteenth Amendment of the United States Constitution . . .").

never addressed the issue of the minors' privacy rights, which had been central to such an analysis in the past.¹⁰⁵

Parental consent restrictions in the abortion context were only upheld and supported under one of three theories: the state's purported interest in protecting the welfare of minors who might not be able to make intelligent choices about their pregnancy; the state's desire to protect the family unit; and the need to protect the parents' right to direct the upbringing of their children.¹⁰⁶ The *Alfonso* court, however, only addressed one of these theories in its analysis: the parents' right to "regulate their children's sexual behavior as best they can."¹⁰⁷ Relying on a line of irreconcilable cases which pioneered parents' liberty interest, the court concluded that parental involvement was constitutionally required.

When a state attempts to restrict the rights of minors through parental consent, courts balance the state's interests against those of the minors, and decide whether such restrictions are constitutionally valid.¹⁰⁸ The *Alfonso* court did not address this prong of the traditional test. Furthermore, the instant case does not fall within the constitutional paradigm, because the state was aligned in interest with the students. Clearly, in *Alfonso*, the Board of Education was seeking to extend, not limit, minors' rights. This dynamic was ignored by the court in its treatment of the parental consent issue. A commentator who exposed the court's misuse of shifting interests as between parents, minors, and the state in the context of minors and abortions, stated that:

[b]y refraining from notification and consent requirements, a state does not prevent the parents' participation. Instead, it is the daughter who decides whether or not to preclude parental involvement. The Court's reliance on parental rights precedents in this context is inapposite because those cases dealt with parents' rights

105. See *Doe*, 615 F.2d at 1166 (stating that:

[o]ne of the first explicit recognitions of the right of privacy came in a case dealing with a statute which prohibited the use of contraceptives. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Though the state has somewhat broader authority to regulate the conduct of children than that of adults, minors do possess a constitutionally protected right of privacy.).

See also *Bellotti*, 443 U.S. at 633-34 (stating that although the constitutional rights of adults and children cannot be evaded, minors do have the protection of the Constitution); *Carey*, 431 U.S. at 692-93 (describing the various rights that minors have under the Constitution, which are afforded the same protection as adults); *Danforth*, 428 U.S. at 74-75 (stating that minors, as well as adults, are afforded protection by the Constitution of the United States); *Wynn*, 582 F.2d at 1383-84 (discussing minors' rights and their evolution of such rights).

106. See *Hodgson*, 497 U.S. at 444 (discussing the factors which comprise the state's strong interest in protecting the welfare of pregnant minors and the family unit).

107. *Alfonso*, 606 N.Y.S.2d at 265.

108. *Hodgson*, 497 U.S. at 417.

as balanced against the state interests, not parents' rights as against those of their children.¹⁰⁹

By shifting the framework of the controversy to the issue of parental consent, the court retained the ability to restrict minors' rights to access condoms.

If analyzed according to the true conflict, the state would be removed from the triangle. Only the competing rights of the students and the parents would be in the balancing equation. As between the students and their parents, the minors' right to privacy is extremely strong.¹¹⁰ The argument that the Constitution required notice to parents before their child had access to condoms was an insupportable position. The *Alfonso* court was aware of this dichotomy, and manipulated the minors' rights out of its analysis through carefully constructed rhetoric.

III. COMPELLING STATE INTEREST FOR PROTECTION OF MINORS' PUBLIC HEALTH OVERLOOKED BY THE APPELLATE COURT IN *ALFONSO*

The *Alfonso* court found that the parents demonstrated an intrusion on their constitutionally protected rights even though the program was voluntary.¹¹¹ The court did not find a compelling state interest which would overcome what it viewed as the parents' due process rights under the Fourteenth Amendment.¹¹² The decision held that:

[t]he issue is not one of purpose but one of effect. We must take great care not to be blinded by the concept that the end justifies the means [W]e conclude that the policy intrudes on the petitioners' rights by interfering with parental decision making in a particularly sensitive area.¹¹³

However, the court did not examine the reality of teens' contraceptive options and sexual activity when they concluded that no compelling

109. Catherine Grevers Schmidt, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 629 (1993).

110. See *Alfonso*, 606 N.Y.S.2d at 269 (Eiber, J., dissenting) (noting that a parental consent requirement runs contrary to the Supreme Court's decision in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) which extended the privacy right to obtain nonprescriptive contraceptives to minors).

111. *Alfonso*, 606 N.Y.S.2d at 265 (claiming that parents are forced to send their children into an environment where obtaining condoms is encouraged by the school, in violation of parental authority and lacking a compelling reason for the state to uphold the program without including a parental consent provision).

112. *Id.* at 265 (concluding that because sexually active students would be able to get condoms in other ways besides the condom distribution program, the program was not necessary to fulfill the compelling state interest of preventing AIDS, and therefore, did not justify interfering with the parents' due process rights).

113. *Id.* at 266.

state interest for the condom distribution program existed.¹¹⁴ A review of the policy considerations involved signifies the need for the program to remain in the school, and the weakness of the court's reasoning.

The United States has a higher teen pregnancy rate than any other developed country.¹¹⁵ In 1987, the National Research Council recommended encouraging diligent contraceptive use as a teen pregnancy prevention strategy. According to Joycelyn Elders,¹¹⁶ the United States "refuse[s] to make a commitment to solving the crises of teenage motherhood because we view pregnancy as just punishment for the sin of premarital sex."¹¹⁷ Communities should teach responsibility for sexual activity. The puritanical ethos being defended by the New York appellate court bears no relation to reality and does not necessarily promote the public welfare of those who adhere to its message. The cost to society of the soaring rate of teen pregnancy demands attention and solutions, yet the appellate court was unwilling to endorse the preventative strategy outlined by our nation's educators.

The *Alfonso* court wrongly concluded that it was condoms, and not the students themselves, who were the means for engaging in sexual activity.¹¹⁸ The Supreme Court has rejected the contention that a minor who has access to birth control is more likely to engage in sexual activity in several cases.¹¹⁹ The Court, in *Carey v. Population*

114. *Id.* at 266 (focusing instead on the parents lack of choice, the court stated that through implementation of the condom distribution program, parents would be forced to send their children into an environment where there would be "unrestricted access" to contraceptives. Despite the health threat posed by AIDS and the wish of school officials to slow the spread of the disease as well as the possibility of pregnancy and other sexually transmitted diseases, the program, nonetheless, essentially removes from parents their rights of supervision and control over their children.).

115. See Paul & Klassel, *supra* note 22, at 45 (citing Jones, Forrest, Goldman, Henshaw, Lincoln, Rostoff, Westoff & Wulf, *Teenage Pregnancy in Developed Countries: Determinants of Policy Implications*, 17 FAM. PLAN. PERSP. 53 (1985)).

116. As U.S. Surgeon General, Joycelyn Elders stood at the forefront of advocating programs designed to teach safer sex and lower teen pregnancy. In December, 1994, just one month after extensive Republican electoral victories, President Clinton requested Dr. Elders' resignation. See Jessica Portner, *Elders' Departure May Signal Shift on Health Issues, Advocates Predict*, EDUC. WEEK, Jan. 11, 1995, at 21 (reporting that Elders' departure is only the beginning of a broad conservative shift in Washington). According to Portner, both Elders' dismissal and the "newly configured Congress signal a dramatic shift to the right on school-health issues at the Federal level." *Id.*

117. M. Joycelyn Elders, Jennifer Hui & Steff Padilla, *Adolescent Pregnancy: Does the Nation Really Care?*, 15 BERKELEY WOMEN'S L.J. 170, 172 (1989-90).

118. See *Alfonso*, 606 N.Y.S.2d at 266 (distributing condoms sends a message of sexual experimentation, which the court is uncomfortable endorsing).

119. See, e.g., *Carey*, 431 U.S. at 679 (Brennan, J.) (plurality opinion) (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973), to support the Court's reasoning that limiting access to birth control will not necessarily discourage teenage sexual activity).

Services International, based its decision, in part, on the lack of evidence demonstrating that access to birth control promotes teen sexuality.¹²⁰ Even Justice Stevens, who did not join the *Carey* plurality, likened such logic to an attempt to "dramatize" state "disapproval of motorcycles by forbidding the use of safety helmets."¹²¹ Studies of adolescents conducted by family planning clinics repeatedly indicate that parental involvement in birth control decisions does not deter teens from engaging in sexual activity.¹²²

Other studies illustrate that nine out of ten teenagers come to family planning clinics after having engaged in sexual intercourse, and most have been active for a year or more by the time of their first visit.¹²³ Clearly, impediments to contraception access do not affect the rate of teenage sexuality. These statistics demonstrate that many teenagers do not consult their parents about such emotional topics.¹²⁴ Parents may have a constitutional right to give their children good advice and guidance, but parents do not have a protected right to keep their children from engaging in sexual activity or from making decisions about birth control. Access to condoms has no direct relationship to whether or not a teenager decides to have sexual intercourse.¹²⁵ Disproving this part of petitioners' argument leaves only one remaining basis for their due process claim: the condom distribution program created an option for teenagers that some parents found inappropriate.

The *Alfonso* court noted that children were not *just* being exposed to contrary ideas or disagreeable opinions.¹²⁶ In dicta, the court

120. *Carey*, 431 U.S. at 679.

121. *Id.* at 715.

122. See Aida Torres, Jacqueline Forrest, and Julianne Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 291 (1980) (noting that 54% of teens surveyed told their parents that they were using contraceptives and 18% did not tell their parents, but stated they would return to the clinic even if they needed parental consent).

123. See L.S. Zabin & S.O. Clark, *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 FAM. PLAN. PERSP. 205, 213 (1981) (finding that more than 85% of patients are sexually active prior to their first clinic visit); *AIDS and Adolescents: The Time for Prevention Is Now* (Center for Population Options, Washington, D.C.), Nov. 1987 [hereinafter *AIDS and Adolescents*] (reporting that 50% of males and 33% of females in U.S. high schools have had intercourse. Yet, less than 10% of high school students participate in comprehensive sexual education courses.). *Id.* at 5; *Teens' Survey of Stores in the District of Columbia on Accessibility of Family Planning Methods* (Center for Population Options, Washington, D.C.), 1988 [hereinafter *Teens' Survey of Stores*] (observing that one in seven teen women attends a family planning clinic prior to her first intercourse. Most female teens delay visiting a clinic for an average of 11.5 month after initially having intercourse.). *Id.* at 3.

124. See source cited *supra* note 122 (giving general discussion of parent-child relationships and the lack of communication concerning sexual activity).

125. See *supra* notes 122, 123 and accompanying text.

126. See *Alfonso*, 606 N.Y.S.2d at 266 (addressing the minority's view that the program is not constitutionally invalid because it is wholly voluntary).

suggested that if this were the situation, a due process claim would fail right alongside the free exercise of religion assertion.¹²⁷ The court thought, however, that the distribution of condoms engendered more than just an environment which some parents found offensive.¹²⁸ The physical availability of condoms went beyond the constitutional limit.¹²⁹ Unlike literature or conversation, the school provided students with the means to "engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases."¹³⁰ Aside from the irony of this quotation, the appellate court ignored two crucial factors: the school did not require any student to receive a condom and dispensing condoms does not encourage sexual activity.¹³¹

Another crisis facing teens is the increasing risk of contracting AIDS and other diseases.¹³² According to the appellate court, "the threat of AIDS cannot summarily obliterate [America's] fundamental values."¹³³ The court does not view AIDS prevention as a responsibility to be shared by everyone, including schools, youth agencies, parents and even religious organizations. The court's refusal to recognize the impact AIDS can, and already does, have on sexually active teens

127. See *id.* (noting that if the problem was merely parents complaining about objectionable information, the claim would fail because the public school needs to prepare students for the real world).

128. *Id.* (distributing condoms goes beyond verbal discussion since the second component of the program crosses the threshold test for objectionable ideas and moves outside the realm of protected speech).

129. See Paul & Klassel, *supra* note 22, at 49 (noting that the actual distribution of contraceptives is a distinction made by conservatives attempting to assert parental rights over minors' rights to privacy). Paul and Klassel suggest that the liberal trend of the 1970s, which fostered an expansion of rights to minors (i.e., allowed them to consent to contraceptive care), began to crumble in the 1980s due to the rise of the religious right. *Id.* The religious right is putting pressure on government agencies to restrict availability of contraceptives to minors, regardless of personal privacy issues. *Id.* at 50.

130. *Alfonso*, 606 N.Y.S.2d at 266.

131. See *id.* at 261 (observing that condoms were available only upon request and a mandatory component of the classroom instruction stressed abstinence from sexual activity); see also *Carey*, 431 U.S. at 694 (stating that minors, like adults, have a constitutional right to use nonhazardous contraceptives).

132. See Maureen E. Lyon, *Not Just a Gay Disease*, WASH. POST, Jan. 20, 1994 (Letters to the Editor) at A22. Lyon, a doctor from the Burgess Clinic at Children's National Medical Center in the Department of Adolescent and Young Adult Medicine submitted this letter. Dr. Lyon reports that most of the patients diagnosed as HIV-positive are young heterosexual women. The World Health Organization found that worldwide infection rates indicate that adolescents are the fastest growing group contracting the disease. According to the Centers for Disease Control, transmission among youth is mainly through heterosexual sex (26%), as opposed to homosexual encounters or intravenous drug use. In the District of Columbia, one out of every 65 teen mothers tests HIV-positive. The rate of HIV infection for adolescents has increased by 400% in the past five years, according to testing done at Children's Hospital in the District of Columbia.

133. *Alfonso*, 606 N.Y.S.2d at 267.

blatantly overlooks all evidence that teens need access to condoms.¹³⁴ The average age of intercourse nationwide is sixteen, and as low as twelve in some communities, yet teenagers are neglecting to protect themselves by using condoms regularly.¹³⁵ Therefore, increasing condom availability would arguably reduce HIV infection among teens by enabling condom use among sexually active minors. A powerful dissent¹³⁶ attacks the majority opinion's refusal to accept the AIDS epidemic as a compelling state interest, especially since the consequence is death.¹³⁷

The spread of AIDS has reached alarming proportions giving rise to a compelling state interest to halt the growth of the epidemic. Clearly, many parents, . . . are seeking to protect their health and morality. The majority overlooks the unfortunate reality that many children lack such interested parents Since the consequence of contracting AIDS is death, providing practical protection against the spread of the virus which causes it, to a high risk population . . . outweighs the minimal intrusion into the parent/child relationship¹³⁸

The majority court's moralistic view contravenes all empirical data about the AIDS crises. The majority in *Alfonso* asks people to accept

134. Justice Eiber's dissenting opinion in *Alfonso* proclaims that "the reality is that adolescents are engaging in sexual intercourse in large numbers." *Id.* at 268. New York City adolescents equal only three percent of the nation's teenagers, but this group of youth comprise twenty percent of all reported cases of teen AIDS. *Id.* Twenty-nine percent of AIDS cases in the United States are in the age group of twenty to twenty-nine. This statistic means that with the disease's latency period, a high number of individuals are contracting the disease while they are in their teens. *Id.*

135. See *AIDS and Adolescents*, *supra* note 123 (describing the high proportion of teens who are at risk of contracting AIDS through sexual experimentation without the proper information about their health and safety). Haffner's paper encourages condom usage and education. *Id.* at 3-4. *Putting the Boys in the Picture: A Review of Programs to Promote Sexual Responsibility Among Young Males* (Carnegie Corp. of New York, New York, N.Y.), 1988, at 107 [hereinafter *Putting the Boys in the Picture*] (noting that the average age of a boy's first intercourse is 12 in "some communities," yet more than 50% of these males use no contraception during their first encounter and only roughly 25% of all sexually active male teens currently use condoms).

136. See *Alfonso*, 606 N.Y.S.2d at 268 (Eiber, J., dissenting) (arguing that the reality is that youths are sexually active and that in an effort to prevent the spread of the HIV virus, condoms should be made available).

137. See H.R. SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, AIDS AND TEENAGERS: EMERGING ISSUES 1 (1988) (discussing the fact that teenagers are the fastest growing group of individuals testing positive for the HIV virus). The Center for Disease Control reports that 226,281 cases of teen AIDS have been recorded as of 1992. The number of teenagers with AIDS doubled between 1989 and 1991. CENTER FOR DISEASE CONTROL, SELECTED BEHAVIORS THAT INCREASE RISK FOR HIV INFECTION AMONG HIGH SCHOOL STUDENTS-UNITED STATES 1990, MORBIDITY & MORTALITY WEEKLY REP. 41 (Apr. 10, 1992).

138. *Alfonso*, 606 N.Y.S.2d at 275 (Eiber, J., dissenting).

that the intrusion on parental rights is so severe that it outweighs all concerns for the adolescent populations health and safety.¹³⁹

To justify their position that the threat of AIDS does not override the parents' right to raise their children as they see fit, and that it is not necessary for schools to provide condoms, the appellate court stated that minors are able to acquire condoms with little difficulty at local drug and convenience stores.¹⁴⁰ The appellate court states that a teenager who so desires can purchase a condom legally "for about the same price as a slice of pizza."¹⁴¹ This reasoning both evades and denies the severity of the situation.

In determining the level of condom availability in locations other than schools, the appellate court did not consider the real life mechanics of teenage sexual encounters and decision-making about birth control. Studies indicate that while teens are generally knowledgeable about where to get condoms, many encounter barriers when actually purchasing them. In Washington, D.C., forty-five drug stores and fifteen convenience stores were surveyed about the physical location, pricing, and clerks' attitudes toward the sale of condoms to teens.¹⁴²

The results indicate that condoms are difficult to locate, behind the counter thirty-five percent of the time, separate from other forms of birth control in half the stores, lack signs indicating where condoms are located on the shelf (thirteen percent had signs), and vary in price from \$1.42 to \$2.99 for a pack of three.¹⁴³ The survey also indicates that females report being harassed forty percent of the time when they are the purchasers.¹⁴⁴ This survey makes clear that the accessibility of family planning methods involves a multitude of considerations which were either oversimplified or disregarded by the court.¹⁴⁵

139. *Id.* at 266-67 (quoting *Ware v. Valley Stream High Sch. Dist.*, 550 N.E.2d 420 (1989), the *Alfonso* court stated that "[a]s with other grave risks we have faced during the past two centuries, the threat of AIDS cannot summarily obliterate this Nation's fundamental values." Accordingly, we must ask whether an interference in the petitioners' rights is necessary to meet this public health threat The answer must clearly be no.").

140. *See Alfonso*, 606 N.Y.S.2d at 266 (asserting that providing condoms in schools is unnecessary and does not qualify as a compelling state interest because teens can purchase condoms legally in other convenient locations).

141. *Id.* (Brief for Petitioner).

142. *See Teens' Survey of Stores*, *supra* note 123, at 8 (surveying stores that sold condoms in an effort to determine the availability, cost and obstacles to obtaining them, and hypothesizing that access is impeded. The results highlighted the need for society to address the issues of confidentiality and convenience regarding family planning services.).

143. *Id.* at 4-5. Note that the survey was taken in 1988 and prices have since increased.

144. *Id.* at 4-5.

145. *See Alfonso*, 606 N.Y.S.2d at 267 (stating in their brief in support of respondents, amici pointed out that publicly funded non-school services provide contraception to minors and fulfill

The role that young males play in teen sexuality is another concern which is not given enough attention by policy makers.¹⁴⁶ Males are directly involved in the choice of whether or not to use contraception, while females are the ones who deal with the actual pregnancy and related decisions. Who initiates the use of contraception and who actually purchases or otherwise acquires contraception are important considerations. Family planning clinics report that males do not seek services in what they believe are female-oriented clinics.¹⁴⁷ The need for male involvement and education is great.¹⁴⁸ Males must be taught as much about pregnancy, sexuality, disease and contraception as females.¹⁴⁹ Studies of teenage males indicate that they have low levels of knowledge about pregnancy risk.¹⁵⁰ Only twenty-seven percent of male respondents age nineteen to twenty-seven know when risk of pregnancy during the menstrual cycle is the greatest.¹⁵¹ Even though boys know far less than girls, they wield a large degree of influence over their partners' choice to use contraception, and the type of contraception used.¹⁵²

Peer pressure and lack of confidence among teenagers leads to skewed patterns of use and awareness about contraception.¹⁵³ When formal sex education classes have been offered, the course typically does not address—"where and how do I obtain contraception?"¹⁵⁴ The need for sexually active teens to receive factually correct family

the state's goal of providing access to birth control for minors).

146. See generally Elders, Hui & Padilla, *supra* note 117, at 178 (stating that "[w]e have ignored male responsibility and relegated many of our disadvantaged young men to the position of expressing their manhood through fathering children."); *Putting the Boys in the Picture*, *supra* note 135, at 107 (focusing on the role young men play in sexual activity and the programs that target males); *A Condom Distribution Program for Adolescents: The Findings of a Feasibility Study* (American Public Health Association, Inc., New York, N.Y.), Oct. 29, 1970 at 19 [hereinafter *A Condom Distribution Program*] (studying the frequency of condom usage when accessibility is improved).

147. See *Putting the Boys in the Picture*, *supra* note 135, at vii.

148. *A Condom Distribution Program*, *supra* note 146 (concluding that young males are willing to take responsibility for family planning. Since condoms are found to be an acceptable contraceptive by adolescent males, they should be offered as part of family planning programs.).

149. *AIDS and Adolescents*, *supra* note 123, at 2-3 (highlighting that studies indicate that most teenagers know very little about AIDS, how it is and is not spread, and how to protect themselves).

150. *Putting the Boys in the Picture*, *supra* note 135 (noting that males who have taken sex education classes know more than males who have not, nonetheless, the amount of knowledge is greatly lacking).

151. *AIDS and Adolescents*, *supra* note 123, at 30.

152. *AIDS and Adolescents*, *supra* note 123, at 30 (explaining that boys express that their pleasure is lessened when condoms or IUD's are used, and that buying and using contraception is embarrassing to them).

153. *AIDS and Adolescents*, *supra* note 123, at 12-13.

154. *AIDS and Adolescents*, *supra* note 123, at 30.

planning information and conveniently accessible condoms, is overwhelmingly obvious, except to the appellate court.

IV. FREE EXERCISE OF RELIGION CLAIM DISMISSED BY THE LOWER AND APPELLATE COURTS BECAUSE THE PROGRAM WAS VOLUNTARY

Both the lower court and the appellate court agreed that no violation of the parents' right to the free exercise of their religion could be found because of the voluntary nature of the program.¹⁵⁵ The Supreme Court had previously examined exposure to objectionable ideas and decided that there had to be a compulsory or prohibitory element to interfere with individual rights.¹⁵⁶ The appellate court could not justify upholding a free exercise of religion violation in the face of such clear constitutional doctrine.

Rejecting petitioners claim under the First Amendment, the court held that the parents were not being denied the ability to practice their religion, or coerced in the nature of these practices.¹⁵⁷ The parents found the program offensive and objectionable, but such a reaction did not rise to the level of a constitutional burden.¹⁵⁸ Distinguishing the cases which the parents used to support their argument, the court noted that "the crucial word in the constitutional test is 'prohibit.'"¹⁵⁹ Consistently, the court has viewed indirect social pressure as a part of life rather than a violation of family

155. *Alfonso*, 584 N.Y.S.2d at 409-11 (explaining that because the parents had not been denied their right to practice their religion, nor stopped from raising their children as they saw fit, since the program was voluntary, a free exercise of religion claim could not be found); *Alfonso*, 606 N.Y.S.2d at 267 (agreeing with the lower court, the appellate court further noted that parents do not have a constitutional right to change public school programs to fit their religious beliefs. Since the students would not face any punishment if they chose not to participate in the condom distribution program, the parents could not successfully claim that their right to practice their religion or their children's right to do the same was violated under the Free Exercise Clause.).

156. See *Sanders*, *supra* note 20, at 1503-04 and accompanying text (stating that the "[t]he concept of 'offensiveness' as a burden on the free exercise of religion has been summarily rejected where the challenged practice involves nothing more than providing the potential for sinful behavior.").

157. See *Alfonso*, 606 N.Y.S.2d at 267 (quoting *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990)) ("The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices." *Id.* at 355).

158. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1066-67 (6th Cir. 1987) (addressing the constitutionality of a mandatory reading program), *cert. denied*, 484 U.S. 1066 (1988).

159. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (commenting that the government did not have to show a compelling justification for voluntary programs).

rights.¹⁶⁰ Voluntary programs do not compel individuals to abandon their convictions or present obstacles to practicing one's beliefs.¹⁶¹ Thus, the program was immune from a free exercise of religion attack.

The court's analysis of the free exercise of religion claim provides an interesting comparison with its position on the parents' due process claim. Illogically, the voluntary program usurped the right of parents to direct the upbringing of their children, but did not violate their ability to freely exercise their religion.¹⁶² Condom availability in the school did not prohibit parents from providing moral and religious guidance and religion to their children.¹⁶³ The court explicitly recognized that an atmosphere of mere availability:

[d]oes not prohibit the petitioning parents and/or their children from practicing their religion. Nor does it directly or indirectly coerce them to engage in conduct or practices which are contrary to their religious beliefs.¹⁶⁴

Parents' constitutional right to be notified when contraceptives were distributed to unemancipated minors, on the other hand, is an issue that has neither been resolved nor is historically rooted. In an attempt to direct the future of this unsettled issue, the court's erratic opinion found the voluntary program implemented by the state sufficiently objectionable to constitute a violation of parental rights. The lower court maintained that whether the claim was phrased as either a free exercise or due process claim, the program must overcome a constitutional challenge because of its voluntary nature.¹⁶⁵ The rationale of the appellate court, when deconstructed,

160. See *Mozert*, 827 F.2d at 1058 (stating that:

the requirement that public school students study a basal reader series chosen by the school authority does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion.

See also *Smith v. Board of Educ.*, 844 F.2d 90, 94 (2nd Cir. 1988) (holding that because attending graduation ceremonies was not required in order to graduate, holding the ceremony on a Saturday did not violate an orthodox Jewish student's right to free exercise of religion).

161. See *Board of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968) (holding that without any element of overt coercion, no free exercise of religion violation could be ascertained).

162. See Donna M. Werner, Note, *Ware v. Valley Stream High School District: At What Expense Should Religious Freedom Be Preserved?*, 64 ST. JOHN'S L. REV. 347 (1990) (noting that the program at issue was not designed to teach moral conduct, but rather, to teach health practices meant to prevent students from contracting and/or spreading disease).

163. See *Alfonso*, 584 N.Y.S.2d at 411 (noting the opportunity which parents have to involve themselves in the program, such as being part of an HIV/AIDS Advisory Council or an alternative Parent Education Committee).

164. *Alfonso*, 606 N.Y.S.2d at 268.

165. See *Alfonso*, 584 N.Y.S.2d at 406 (claiming that the voluntary nature of the program meant that the parents' claim amounted to nothing more than a moral lawsuit, rather than a prima facie case under the body of due process law developed by the highest courts of the land).

appears to be a carefully manipulated interpretation of firmly established legal principles.

CONCLUSION

The *Alfonso v. Fernandez* decision symbolizes a change in social and legal policy toward teenage sexuality that contradicts judicial doctrine and the very concept of progress. The "ostrich" approach¹⁶⁶ adopted by the New York Appellate Court, overruling the lower court's decision, will not further the state's rationale for implementing the condom distribution program—confidential access. Mandatory parental involvement has repeatedly been proven to prevent minors from behaving in the most responsible manner possible, while also failing to lower the incidence of actual intercourse. Parental involvement will not lower currently rising percentages of teenage mothers, teen AIDS victims, nor strengthen the family unit. Society should encourage adolescents to make mindful choices. Instead, the court's holding in *Alfonso* transgresses the minors' privacy rights and the state's ability to enact forward-thinking legislation. It is counterproductive and hypocritical to bemoan social ills while refusing to discuss them in the appropriate and necessary forum. Schools and local communities, who are best equipped to formulate policies and experiment with educational programs, have been jettisoned by this example of judicial activism.¹⁶⁷ The appellate court created a fictitious constitutional right when it determined that the liberty interest of parents in their children's sexual activities exceeds the rights of the State, the students, and society as a whole.

166. This author's colloquial use of the term in this context means "sticking their heads in the sand to avoid the real issues."

167. The Supreme Judicial Court of Massachusetts, in *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995), granted summary judgment in favor of the school committee when parents alleged that a program of condom availability, established in junior and senior high school, violated their rights to familial privacy, parental liberty and free exercise of religion. The court held that the program, which made condoms available to students without parental consent or parental opt-out provisions, did not violate either the fundamental liberty interest of parents to be free from unnecessary governmental intrusion in rearing their children, or the free exercise of religion under the First Amendment. Plaintiffs, relying on *Alfonso v. Fernandez*, argued that the condom availability program was coercive. Although participation was voluntary, the program had been implemented in the compulsory setting of the public schools. The Massachusetts court disagreed with the reasoning of the *Alfonso* court and articulated that the holding in *Alfonso* was erroneously decided. Citing the dissent from *Alfonso*, the *Curtis* court held that no coercive burden on the parental liberties existed because no classroom participation was required of students. Students were not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. The program did not qualify as state action of a coercive or compulsory nature, and did not constitute a viable claim under the Fourteenth Amendment. The condom program in the public schools will remain uncompromised in Massachusetts, leaving this issue ripe for judicial review by the United States Supreme Court to resolve the differences amongst the states.

